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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

BARTELL RANCH LLC, et al.,)	Case No.: 3:21-cv-80-MMD-CLB
)	(LEAD CASE)
Plaintiffs,)	
)	
v.)	
)	
ESTER M. MCCULLOUGH, et al.,)	RSIC's MOTION FOR
)	DISCOVERY SANCTIONS
Defendants,)	
and)	
)	
LITHIUM NEVADA CORPORATION,)	
)	
Intervenor-Defendant.)	

WESTERN WATERSHEDS PROJECT, et al.,)	Case No.: 3:21-cv-103-MMD-CLB
)	(CONSOLIDATED CASE)
Plaintiffs,)	
)	
RENO SPARKS INDIAN COLONY, et al.,)	

Intervenor-Plaintiffs,

and

BURNS PAIUTE TRIBE,

Intervenor-Plaintiff.

v.

UNITED STATES DEPARTMENT OF THE
INTERIOR, et al.,

Defendants,

and

LITHIUM NEVADA CORPORATION,

Intervenor-Defendant.

Intervening-Plaintiff Reno-Sparks Indian Colony (“RSIC”) respectfully moves the Court to sanction Federal Defendant Bureau of Land Management (“BLM”) for failing to obey orders to provide or permit discovery pursuant to Fed. R. Civ. P. 37(b)(2)(A); for submitting reckless and frivolous filings designed to harass the plaintiffs and to unreasonably and vexatiously multiply the proceedings, in violation of 28 U.S.C. § 1927; and for abusing the litigation process by failing to obey discovery orders and, while failing to obey those discovery orders, for failing to disclose the extent of the documentation it withheld as “deliberative.”

Introduction

BLM arbitrarily and capriciously rushed the Thacker Pass Project permitting process. Fast-tracking the permitting process for the nation’s largest and most complex lithium mine caused BLM to fail to meet its responsibilities under the National

1 Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA).
2 Fast-tracking the permitting process also limited administrative and public review of the
3 Project.

4 It should be no surprise, then, that BLM's litigation strategy has involved
5 withholding key parts of the AR for as long as possible. BLM waited until two motions for
6 preliminary injunction were denied, a motion for reconsideration was denied, multiple
7 motions to supplement the AR were filed, a motion to amend the complaint was denied,
8 an opening appellate brief was filed, and a motion to intervene was denied before
9 turning over or listing in a privilege log nearly 42,000 pages of the AR. These nearly
10 42,000 pages include a significant amount of evidence that undermines important
11 factual and legal contentions BLM made while opposing all of the aforementioned
12 motions.

13 So far, BLM has succeeded in withholding major portions of the AR that
14 undermine BLM's position – documents that likely would have supported different
15 rulings by the Court – until it was too late in the litigation for the parties to reference the
16 documents in anything but their motions for summary judgment. In cases like this one,
17 where judicial review is limited to an AR controlled and compiled by defendant
18 agencies, judicial review is severely undermined when agencies aren't forthright about
19 what's actually in the AR. In these cases, only government agencies truly know what is
20 in the AR. Because of this, plaintiffs are mostly at the mercy of the agencies to describe
21 and produce a whole and complete AR. When it is clear that an agency has taken
22 advantage of the plaintiffs' blindness about what is in the AR (and the Court's interest in
23 issuing a ruling on the merits) to withhold documentation that undermines the agency's

position, the public interest in judicial review of agency decisions must be protected by sanctioning the agency's conduct.

RSIC sent a letter to the parties on April 1, 2022 asking BLM to agree to stipulate to the relief RSIC seeks in this motion. BLM only acknowledged receipt of the letter but did not respond to RSIC's request to stipulate.

Legal Standards

Fed. R. Civ. P. 37(b)(2)(A)

"If a party or a party's officer, director, or managing agent...fails to obey an order to provide or permit discovery...the court where the action is pending may issue further just orders." Fed. R. Civ. P. 37(b)(2)(A)

Those orders "may include the following:

- "(i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;"
- "(ii) prohibiting the disobedient party from supporting or opposing designating claims or defenses, or from introducing designated matters in evidence;"
- ...
- "(iv) staying further proceedings until the order is obeyed;"
- ...
- "(vi) rendering a default judgment against the disobedient party"
- "(vii) treating as contempt of court the failure to obey any order..."

Fed. R. Civ. P. 37(b)(2)(A)(i-vii)

"Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust." Fed. R. Civ. P. 37(b)(2)(C).

1 “Rule 37(b) sanctions may serve either remedial and compensatory purposes or
 2 punitive and deterrent purposes.” *Falstaff Brewing Corp. v. Miller Brewing Co.*, 702,
 3 F.2d 770, 783-784 (9th Cir. 1983). “The very purpose of Rule 37 is to insure compliance
 4 with discovery orders. Without adequate sanctions the procedure for discovery would be
 5 ineffectual.” *Grimes v. City and County of San Francisco*, 951 F.2d 236, 240-241 (9th
 6 Cir. 1991). “To that end, Rule 37 is flexible: The sanctions enumerated in the rule are
 7 not exclusive and arbitrary but flexible, selective, and plural. The court may within
 8 reason, use as many and as varied sanctions as are necessary to hold the scales of
 9 justice even.” *Id.* at 241 (internal citations omitted).

10 “[T]he plain language of Rule 37(b) contains no requirement mandating a noticed
 11 motion or opportunity to be heard before sanctions – including default – may be
 12 imposed.” *Dreith v. Nu Image, Inc.*, 648 F. 3d 779, 787 (9th Cir. 2011).

13 Failure to produce or complete an administrative record can be the basis for
 14 sanctions. See *Diaz-Fonseca v. Puerto Rico*, 451 F.3d 13, 26 (1st Cir. 2006) and *Nat’l*
 15 *Urb. League v. Ross*, 2020 WL 5548117, at *5 (N.D. Cal. Sept. 15, 2020). “Rule
 16 37(b)(2) allows for sanctions ‘[i]f a party...fails to obey an order to provide or permit
 17 discovery,’ and nothing in the rule requires that the failure be on account of bad faith.”
 18 *Diaz-Fonseca v. Puerto Rico*, at 26 (quoting Fed. R. Civ. P. 37(b)(2)).

19 RSIC’s claims are brought under the Administrative Procedure Act (APA), 5
 20 U.S.C § 701-706. “Thus, while the Court’s obligation to review the ‘whole record’ in an
 21 APA case is derived from the APA itself, 5 U.S.C § 706, its power to order production or
 22 completion of that record is derived from the Federal Rules of Civil Procedure.” *New*
 23 *York v. U.S. Dep’t of Commerce*, 461 F.Supp. 3d 80, 94 (S.D.N.Y. 2020). In these

1 circumstances, “the distinction between orders that carry the label ‘discovery’ and those
2 that order completion of the administrative record disappears.” *Id.* So, the usual rule
3 applies: “Provided that there is a clearly articulated order of the court requiring specified
4 discovery, the district court has the authority to impose Rule 37(b) sanctions for
5 noncompliance with that order.” *New York v. U.S. Dept of Commerce*, at 94 (quoting
6 *Daval Steel Prods., a Div. of Francosteel Corp. v. M/V Fakredine*, 951 F.2d 1357, 1363
7 (2d Cir. 1991)).

8 “The definition of ‘order’ in Rule 37(b) has been read broadly.” *Unigard Sec. Ins.*
9 *Co. v. Lakewood Eng’g & Mfg. Corp.*, 982 F.2d 363, 368 (9th Cir. 1992). “Violations of a
10 scheduling order may result in sanctions, including dismissal under Rule 37(b)(2)(C).”
11 *Atchison, Topeka and Santa Fe Ry. Co. v. Hercules Inc.*, 146 F.3d 1071, 1073 (9th Cir.
12 1998).

13 The Ninth Circuit has identified five factors that a district court must consider
14 before dismissing a case or declaring a default:

15 (1) the public’s interest in expeditious resolution of litigation; (2) the court’s need
16 to manage its docket; (3) the risk of prejudice to the other party; (4) the public policy
17 favoring the disposition of cases on their merits; and (5) the availability of less
18 drastic sanctions.

19
20 *Adriana Intern. Corp. v. Thoerenm* 913 F.2d 1406, 1412 (9th Cir. 1990)

21 “We may affirm a dismissal where at least four factors support dismissal, or
22 where at least three factors strongly support dismissal.” *Yourish v. Cal. Amplifier*, 191
23 F.3d 983, 990 (9th Cir. 1999). “Where a court order is violated, the first two factors
24 support sanctions and the fourth factor cuts against a default. Therefore, it is the third
25 and fifth factors that are decisive.” *Adriana Intern. Corp* at 1412. “Failure to produce
26 documents as ordered, however, is considered sufficient prejudice.” *Id.*

1 **28 U.S. Code § 1927**

2 “Any attorney or other person admitted to conduct cases in any court of the
3 United States or any Territory thereof who so multiplies the proceedings in any case
4 unreasonably and vexatiously may be required by the court to satisfy personally the
5 excess costs, expenses, and attorneys’ fees reasonably incurred because of such
6 conduct.” 28 U.S.C. § 1927.

7 Section 1927 sanctions “must be supported by a finding of subjective bad faith.”
8 *New Alaska Development Corp. v. Guetschow*, 869 F.2d 1298, 1306 (9th Cir. 1989).
9 “Bad faith is present when an attorney knowingly or recklessly raises a frivolous
10 argument, or argues a meritorious claim for the purpose of harassing an opponent.”
11 *Estate of Blas v. Winkler*, 792 F.2d 858, 860 (9th Cir. 1986) (citations omitted). “For
12 sanctions to apply, if a filing is submitted recklessly, it must be frivolous, while if it is not
13 frivolous, it must be intended to harass.” *In re Keegan Management Co., Securities*
14 *Litigation*, 78 F.3d 431, 436 (9th Cir. 1996)

15 **Inherent power to levy sanctions for abusive litigation practices**

16 Courts are invested with inherent powers that are “governed not by rule or statute
17 but by the control necessarily vested in courts to manage their own affairs so as to
18 achieve the orderly and expeditious disposition of cases.” *Chambers v. Nasco, Inc.*, 501
19 US 32, 43 (1991). The Ninth Circuit has recognized as part of a district court’s inherent
20 powers the “broad discretion to make discovery and evidentiary rulings conducive to the
21 conduct of a fair and orderly trial.” *Unigard Sec. Ins. Co. v. Lakewood Engineering &*
22 *Mfg. Corp.*, 982 F.2d 363, 368 (9th Cir. 1992). “A primary aspect of that discretion is the

1 ability to fashion an appropriate sanction for conduct which abuses the judicial process.”
 2 *Chambers*, at 44-45.

3 “Sanctions are available for a variety of types of willful actions, including
 4 recklessness when combined with an additional factor such as frivolousness,
 5 harassment, or an improper purpose. Therefore...an attorney’s reckless misstatement
 6 of law and fact, when coupled with an improper purpose,...are sanctionable under a
 7 court’s inherent power.” *BKB v. Maui Police Dept.*, 276 F.3d 1091, 1108 (9th Cir. 2002).

8 **Background**

9 On September 13, 2021, the Court ordered: “Defendants will produce the
 10 administrative record on the additional claims brought by Plaintiff-Intervenors (the
 11 “Tribal Claims”) by October 1, 2021.” ECF No. 94, pg. 3. On November 23, 2021, BLM’s
 12 Lead Geologist for the Humboldt River Field Office, Winnemucca District Office Kenton
 13 M. Loda certified that the two indices lodged with the Court at that time constituted the
 14 record for the allegations contained in the complaints filed by the Plaintiffs and the
 15 Intervenor Plaintiffs. ECF No. 136-1, pg 3.

16 In its December 27, 2021 Order, this Court relied on *Ksanka Kupaqa Xa’lcin v.*
 17 *United States Fish & Wildlife Serv.*, Case No. CV 19-20-M-DWM, 2020 WL 4193110 (D.
 18 Mont. Mar. 9, 2020) to find that “the administrative record includes all documents and
 19 materials directly or indirectly considered by the agency, which must include some
 20 deliberative materials.” ECF No. 155, pg. 5. This Court also found: “‘judicial review
 21 would be severely undermined if agencies could keep information from the court merely
 22 by classifying them as deliberative.’ And [in *Ksanka Kupaqa Xa’lcin*], like here, the
 23 defendants admitted that deliberative materials were omitted from the administrative

1 record, which is sufficient to overcome that the administrative record is complete.” *Id.*
2 pg. 5. (internal citation omitted)

3 With this reasoning, the Court ordered BLM to “supplement the AR within 30
4 days with any materials previously withheld as deliberative, or alternatively identify any
5 documents still withheld as deliberative when Defendants supplement the AR in a
6 privilege log.” ECF No. 155, pgs 5-6. This gave BLM a choice: either to supplement the
7 AR with materials previously withheld as deliberative, or to identify any documents still
8 withheld as deliberative in a privilege log. BLM made its choice: On February 11, 2022,
9 BLM mailed new thumb drives with BLM’s supplementary documentation. When RSIC’s
10 counsel received these new thumb drives, they were surprised to learn that BLM was
11 supplementing the administrative record with over 30,000 new pages to the EIS
12 Decision File (which nearly doubled the EIS decision File), over 2,000 new pages in the
13 NHPA Decision File (which more than doubled the NHPA Decision File), and adding
14 nearly 9,000 new pages to the privilege log.

15 The inconsistencies between BLM’s communications with the parties and BLM’s
16 representations to the Court make it difficult to understand exactly why so much new
17 documentation was being produced for the first time. On January 24, 2022, United
18 States Department of Justice Attorney Leilani Doktor emailed counsel for all the parties
19 and stated:

20 “**Since December 27, 2021**, BLM has been conducting a thorough review of its
21 records to ensure that all documents ordered included in the record by the Court and all
22 deliberative documents withheld on that basis or under another privilege are appropriately
23 logged, as the Court required. **In searching its records it found around 8,000**
24 **documents – mostly emails – that may relate to the Thacker Pass Lithium project**
25 **decision. It then reviewed those 8,000 documents.** The purpose of the review is to
26 exclude duplicate, or non-substantive (“thank you”) emails and combine emails of the
27 same thread into single documents/files for inclusion into the AR and entry onto the AR

1 index. All of these emails and documents will be included in the next production of the AR
2 but the number of total entries will likely be less because of the elimination of duplicates
3 and combining process. During that review BLM determined that an additional privilege
4 review of 800 documents for inclusion is also necessary, those documents need to be
5 reviewed by attorneys and logged in the privilege log with reasons, which is part of why
6 we have requested additional time.” (emphasis supplied)
7

8 Exhibit 1, Falk Declaration; Exhibit 2, Jan. 24, 2022 Doktor Email.
9

10 BLM, in its January 25, 2022 Unopposed Motion for Extension of Time (ECF-
11 173), stated:

12
13 “[BLM] has been diligently working to comply with the Court’s order, and continues to do
14 so. However, due to the number of documents that needed to be reviewed – over 6,000
15 (many containing attachments that must be individually reviewed) relating to the NEPA
16 process alone – and the additional work needed to add the documents, BLM needs an
17 additional two weeks to fully comply with the Court’s order. Following the agency’s review
18 of documents, it is [sic] has determined 800 of those deliberative documents need to be
19 further screened prior to production.”
20

21 It appears from Doktor’s email to the parties and BLM’s Unopposed Motion for
22 Extension of Time that this new documentation was either not discovered by BLM until
23 after December 27, 2021 or BLM had been withholding 8,000 (or 6,000) documents as
24 deliberative without ever actually determining that they were in fact deliberative.

25 On February 11, 2022, Kenton M. Loda again certified the AR on February 11,
26 2022. ECF No. 178-1. Loda stated:

27 “Following the court’s December 27, 2021 order (ECF No. 155) regarding the
28 administrative record lodged with the court on November 23, 2021, I oversaw the addition
29 to the administrative record of (i) all deliberative documents previously excluded, (ii) all
30 comments between BLM and Bartell Ranch LLC and Edward Bartell previously excluded,
31 and (iii) letters from the Nevada Division of Environmental Protection, Bureau of Mining [sic]
32 Regulation and Reclamation and Nevada Department of Wildlife letters described at ECF
33 No. 155 at 11-14..”
34

35 Loda, also stated: “I hereby certify, all records identified in the attached indices
36 and provided to the Court and parties, constitute a true and correct copy of the relevant

1 records as retained in the BLM's files and include all materials directly or indirectly
2 considered for the BLM decisions at issue in this case."

3 But, Loda's certification was false. His February 11 statements certified a NHPA
4 Claims Record that was being supplemented with no less than 32 documents that post-
5 date the ROD. BLM could not have directly or indirectly considered those documents
6 when deciding to issue the ROD because those documents didn't exist at the time.
7 Demonstrating the falsity of Loda's certification, on March 28, 2022, BLM counsel
8 explained in an email that "the post decisional documents that are currently in the
9 record were inadvertently included" and refused to supplement the AR with the
10 complete post-ROD file, which includes letters from 6 tribes complaining about BLM's
11 failure to engage in consultation before the ROD was issued. Exhibit 1, Falk
12 Declaration; Exhibit 3, March 28, 2022 Doktor email.

13 **Argument**

14 **I. BLM had strong motives to withhold documents until as late as possible in the** 15 **litigation.**

16
17 In the draft EIS, final EIS, Record of Decision, letters to the Nevada SHPO, and
18 in numerous statements to this Court, BLM claimed it consulted with the Fort McDermitt
19 Paiute and Shoshone Tribes, the Summit Lake Paiute Tribe, and the Winnemucca
20 Indian Colony. The February 11, 2022 production includes letters from BLM to Fort
21 McDermitt, Summit Lake, and the Winnemucca Indian Colony sent on April 14, 2021
22 notifying the tribes of the approved HPTP. TPNHPA-0005. It also includes responses
23 from Fort McDermitt and Summit Lake where the tribal governments for those tribes
24 complained of the lack of any consultation about the Project up to that point. TPNHPA-
25 0007; TPNHPA-0009.

1 Inexplicably, BLM continues to withhold a similar April 19, 2021 response from
2 the Winnemucca Indian Colony where the Colony council stated: “We are concerned
3 that you [sic] document ‘Final Formatted LNC Thacker HPTP’ on page 47, states that
4 consultation was held with the Winnemucca Indian Colony beginning in 2017 and
5 continues to date. We believe that is not true, and that BLM or others have NOT
6 consulted with the Winnemucca Indian Colony regarding this proposed project.” ECF
7 No. 141-2, pg. 3. This evidence clearly contradicts BLM’s statements about consulting
8 with the Tribes.

9 All of the Plaintiffs argue that BLM rushed the Thacker Pass permitting process.
10 The Thacker Pass EIS Project Kickoff Meeting Notes (TPEIS–0003) that BLM
11 previously withheld shows this is true. The meeting began with a discussion about
12 “streamlining” the NEPA process. AR-082182. In fact, it appears the Thacker Pass
13 permitting process was an experiment, as “BLM noted that this EIS will be the first
14 greenfield mine EIS in the [Humboldt River Field Office] that is conducted from start to
15 finish under SO 3355.” *Id.*

16 Under SO 3355, the Department of the Interior ordered BLM Winnemucca to
17 permit the Thacker Pass Project in no longer than a year. Emails that BLM previously
18 withheld show how arbitrary, unreasonable, and capricious this order was. For example,
19 a series of newly supplemented emails demonstrate how much pressure Project Lead
20 Ken Loda was under and how rushed this Project truly was. On April 14, 2020, for
21 example, Loda explained to other BLM employees: “[W]e’re not going to make the one-
22 year deadline...we likely won’t be able to meet the page limitations, and I’m thoroughly
23 frustrated trying to keep this process moving given the complexities of this proposal and

1 the issues needing to be addressed in the EIS.” TPEIS-1203, pg. AR-099452. Later in
2 the same email he wrote, “[W]e’re still struggling to adequately address a couple of the
3 environmental issues.” *Id.*

4 These Project Kickoff Meeting Notes are also significant because BLM has tried
5 to claim that a meeting in Thacker Pass with some Fort McDermitt tribal members
6 counts as consultation under NHPA. However, the Notes state that this meeting did not
7 occur. *Id.* at AR-082185. These Notes also state that BLM planned next steps to include
8 “presenting the Proposed Action to the tribes in-writing and in-person” just like BLM
9 manuals instruct. *Id.* But there is no indication in the AR that BLM ever presented the
10 Proposed Action to the Tribes in person.

11 The Tribal Plaintiffs argue that BLM failed to provide tribal and public consultation
12 in a manner that reflects the complexity of the Project. Additionally, Lithium Nevada and
13 BLM have tried to characterize a massive open pit mine that would pollute groundwater
14 for hundreds of years, destroy habitat for threatened species like greater sage grouse
15 and golden eagles, and would produce the greenhouse gas emissions of a small city as
16 somehow safe and “green.”

17 It’s no wonder, then, that BLM tried to keep documents with statements about the
18 destructiveness of this Project out of the AR for as long as possible. For example, BLM
19 previously withheld emails from BLM Native American Coordinator Tanner Whetstone
20 wherein Whetstone acknowledged “...most projects aren’t this huge or destructive...”
21 TPNHPA-0233, pg. AR-004676. Whetstone also stated that the Thacker Pass project is
22 a “large ground-disturbing” project. *Id.* In another previously withheld email, Whetstone
23 acknowledged the “[Thacker Pass Obsidian Procurement District] is really the only well-

1 inventoried/documented component and would pretty much be destroyed by the
2 project...” TPNHPA-0246, pg. AR-004709.

3 RSIC contends that BLM’s decision to fast-track the tribal and public consultation
4 period through the worst part of COVID-19 was arbitrary and capricious. BLM’s
5 capriciousness is reflected in a previously withheld document where BLM Nevada
6 Native American Coordinators were asked to provide the status of government-to-
7 government consultation. TPNHPA-0186. In fact, BLM Nevada Lead Archaeologist
8 Bryan Hockett directly asked all Native American Coordinators: “If there are
9 communication issues with specific tribes that could hinder our ability to authorize
10 certain projects, what are these projects and can they be resolved over the next 30-60
11 days, or is it likely that a project will need to be delayed.” *Id.* at AR-002203. Humboldt
12 River Field Office Assistant Manager Kathleen Rehberg asked Tanner Whetstone point-
13 blank about Thacker Pass tribal consultation. *Id.* at AR-002202.

14 However, a table attached to these emails shows that Whetstone updated
15 Hockett about other projects in the Winnemucca District Office, but strangely not
16 Thacker Pass. *Id.* pg. AR-002204-06. This table also shows that BLM was well-aware
17 that many tribes were struggling to keep up with BLM consultation while tribal offices
18 were closed and tribal employees were working from home. The table states about the
19 Summit Lake Paiute Tribe, concerning the Ormat Baltazor Project in the Humboldt River
20 Field Office, that: “Summit Lake’s office is closed to the public, not sure on the status of
21 Fort McDermitt. Their review of the MOA/HPTP could be delayed.” *Id.* pg. AR-002204.

22 As discussed above, previously withheld emails show BLM employees under
23 extreme stress at this time while they tried to keep the Thacker Pass Project on the fast-

1 track. Perhaps Thacker Pass was left out of this document because BLM employees
2 recognized that COVID-19 precautions and restrictions required delaying the Project to
3 give tribes enough time to consult.

4 **II. BLM violated Rule 37(b)(2)(A) by failing to produce a complete AR while**
5 **negligently overlooking 8,000 documents or by unreasonably withholding**
6 **42,000 pages of documents as deliberative.**
7

8 On December 27, 2021, the Court ordered BLM to “supplement the AR within 30
9 days with **any materials previously withheld as deliberative**, or alternatively identify
10 any documents still withheld as deliberative when Defendants supplement the AR in a
11 privilege log.” ECF No. 155, pgs 5-6 (emphasis added). BLM did not obey this order.

12 After the parties reviewed the newly supplemented AR, on February 22, 2022
13 and again on March 8, 2022 Western Watersheds Project’s counsel and, on February
14 23, 2022, Bartell’s counsel notified BLM of documents BLM withheld from the February
15 11 AR production and other problems with the AR. (Exhibit 4, Parties’ AR Email Chain).
16 On March 25, 2022, BLM’s counsel provided 14 documents. *Id.* The March 25, 2022
17 batch of documents included TPEIS-1499 (July 1, 2020 Letter from Bartell to BLM
18 Winnemucca about hydrology baseline data) and TPEIS-1500 (series of emails
19 between Bartell and BLM employees). BLM withheld these documents from the
20 February 11 AR production, despite the Court specifically ordering these
21 communications to be produced in the December 27 Order. The March 25, 2022 batch
22 of documents also included supplements to TPEIS-1434, TPEIS-1116, TPEIS-1339,
23 and TPEIS-0918. These supplements had been withheld from the February 11
24 production as deliberative, but were not listed in the privilege log contrary to the Court’s
25 December 27, 2021 order.

1 BLM's choice to supplement the AR with 32,000 new pages instead of listing
2 them in the privilege log demonstrates either that BLM wrongfully withheld the 32,000
3 pages always knowing they were not deliberative or that BLM discovered the 32,000
4 pages after previously certifying that the AR was complete. Both scenarios are grounds
5 for sanctions.

6 If BLM only discovered the 8,000 documents after December 27, 2021, then BLM
7 produced an incomplete AR in July 2021 and October 2021. By producing an
8 incomplete AR, BLM disobeyed the Court's June 21, 2021 and September 13, 2021
9 Orders. ECF No. 28, pg. 5; ECF No. 94, pg 3. These are violations of Rule 37(b)(2)(A).

10 BLM may claim that it knew about these nearly 42,000 pages of documents all
11 along. If BLM knew about the nearly 42,000 pages, then, as Plaintiff Bartell pointed out
12 in his recent motion to amend the scheduling order ECF No. 186, pgs 6-7, n. 2, BLM
13 withheld records that should have been in the AR when BLM was first ordered to
14 produce the AR. That is a violation of Rule 37(b)(2)(A).

15 BLM may claim that it was reasonably withholding 42,000 pages of documents
16 as deliberative. First, if BLM truly thought those documents were deliberative, it would
17 have listed this documentation in a privilege log so, as this Court noted, the Court could
18 "adequately review the Defendants' decision to approve the Project..." ECF No. 155,
19 pg. 6. BLM's failure to produce this privilege log means the earlier productions of the AR
20 were incomplete, which again is a violation of Fed. R. Civ. P. 37(b)(2)(A).

21 It is telling that BLM simply added 32,000 new pages to the AR. If those 32,000
22 new pages were truly deliberative, then BLM could have continued to withhold them as

1 privileged while simply identifying them in a privilege log. Finally, BLM should have, at
2 least, disclosed the vast amount of documentation it was withholding as deliberative.

3 **III. BLM violated 28 U.S.C. § 1927 by making repeated, reckless statements to**
4 **the Court about the completeness of the AR when the AR, in truth, was far**
5 **from complete.**
6

7
8 BLM's certification of the February 11 AR with the statements about the new AR
9 constituting "a true and correct copy of the relevant records" and how Loda oversaw the
10 addition of only "(i) all deliberative documents previously excluded, (ii) all comments
11 between BLM and Bartell Ranch LLC and Edward Bartell previously excluded, and (iii)
12 letters from the Nevada Division of Environmental Protection, Bureau of Ming [sic]
13 Regulations and Reclamation and Nevada Department of Wildlife letters" proved to be
14 false. Not only were they false, but with BLM producing parts of the AR piecemeal as
15 late as March 25, 2022 while knowing that the Plaintiff's Motions for Summary
16 Judgment are due on April 5, 2022, it's clear that these reckless, false statements were
17 made to improperly limit the parties' review of the AR.

18 If BLM knew about the 42,000 pages of documents it previously failed to include
19 in the AR or list as deliberative in the privilege log, then BLM's decision not to include
20 these documents in the original AR or to list them in the privilege log is a reckless action
21 made with an improper purpose – to limit the parties' and the Court's review of the
22 documents by withholding them for as long as possible, in violation of 28 U.S.C. §
23 1927. BLM's decision to supplement the AR with 32,000 of those pages instead of
24 continuing to withhold them as deliberative while listing them in the privilege log is a
25 clear indication that these documents are not deliberative and that BLM always knew or
26 should have known that they were not deliberative.

1 Prior to February 11, 2022, BLM made repeated, strident statements, in papers
2 filed with the court, about the completeness of the AR, in pointed resistance to all of the
3 Plaintiffs' motions to supplement the record and to encourage the Court to deny RSIC's
4 motion for leave to amend. In BLM's opposition to the Tribal Plaintiffs' motion to
5 supplement the administrative record, BLM stated: "The BLM has compiled a record
6 containing all documents and materials directly or indirectly considered by the agency,
7 and that record is more than adequate for judicial review. The existing Record provides
8 all the information the Court needs, and may legally consider, to resolve Plaintiff-
9 Intervenor's claims. For these reasons, and for the reasons described below, the Court
10 should deny Plaintiff-Intervenor's motion to supplement the administrative record." ECF
11 No. 130, pg. 2.

12 Later in the same opposition, BLM claimed: "BLM has provided the 'whole'
13 Record, *i.e.* including how its environmental analysis and consultation efforts comply
14 with both NEPA and the NHPA. And that Record already contains most of the
15 information requested by Plaintiff-Intervenor, outside of a few documents not
16 considered by the agency." *Id.* pgs. 4-5.

17 Arguing that RSIC's motion for leave to amend its complaint would prejudice
18 BLM because it would require the preparation of a new administrative record, BLM
19 stated: "As explained in Federal Defendants' surreply in opposition to Plaintiff-
20 Intervenor's motion to supplement the administrative record, the administrative record
21 already compiled, served, and lodged in this action 'consists of all documents and
22 materials directly or indirectly considered by the agency decisionmakers in making [sic]

1 January 15, 2021 decision.” ECF No. 154, pgs 23-24 (citing *Thompson v. U.S. Dep’t of*
2 *Labor*, 885 F.2d 551, 555 (9th Cir. 1989).

3 BLM made similar statements in its opposition to Bartell’s and the Conservation
4 Plaintiffs’ motions to complete or supplement the AR. BLM even went so far as to state:
5 “And BLM’s certification that the record is complete – that it includes those “considered”
6 materials – is entitled to a presumption of regularity...” ECF No. 122, pg.

7 A reasonable inquiry into the completeness of the AR would have revealed the
8 8,000 new documents and would have demonstrated that BLM’s factual contentions
9 about the AR lacked evidentiary support. Therefore, BLM’s many statements about the
10 completeness of the AR were reckless and violate 28 U.S.C. § 1927.

11 Alternatively, BLM’s decision to supplement the AR with around 32,000 new
12 pages of documents instead of listing them in the privilege log demonstrates that BLM
13 knew its previous legal contention that it didn’t have to include the 32,000 new pages in
14 the AR or list them in the AR’s privilege log was neither warranted by existing law or by
15 a nonfrivolous argument for extending, modifying, or reversing existing law or for
16 establishing new law. Therefore, BLM’s certification of the AR as complete and its
17 previous legal contentions about deliberative documents were reckless or made in bad
18 faith and, again, violate 28 U.S.C. § 1927.

19 **IV. BLM’s violations of Rule 37(b) and 28 U.S.C. § 1927 have severely**
20 **prejudiced RSIC.**
21

22 BLM’s disobedience of the Court’s discovery orders and its misrepresentations in
23 papers filed with the Court have severely prejudiced RSIC. First, RSIC never would
24 have agreed to the current scheduling order or agreed to be limited to a 25-page
25 summary judgment motion in this case if they knew BLM was withholding documents

1 that would double the size of the NHPA AR and nearly double the size of the NEPA AR.
2 This has forced RSIC to move for an extension of time to review the AR.

3 Reviewing over 40,000 pages of new and undisclosed documents seriously
4 stresses RSIC's resources. RSIC is vastly outmatched by the resources BLM and
5 Lithium Nevada Corp. ("Lithium Nevada") can bring to bear in this litigation. This
6 disparity has been further exacerbated by nearly \$50,000 in (what appear to be)
7 retaliatory fines levied by BLM against counsel Will Falk just a few weeks after he
8 helped RSIC file its motion to intervene in this case¹.

9 BLM's new document dump also arrived conveniently after the Tribal Plaintiffs'
10 notice of appeal and the filing of the Tribal Plaintiffs' opening appeal brief with the Ninth
11 Circuit. When the appellate record is limited to the documents before the district court,
12 withholding this documentation for so long means that the Tribal Plaintiffs would have to
13 engage in motion practice in the Ninth Circuit to seek supplementation of the appellate
14 record with documentation that BLM possessed that the Tribal Plaintiffs did not know
15 about.

16 Second, BLM's numerous statements that the July 30, 2021 and October 1, 2021
17 productions of the AR were complete have been a key factor supporting the Court's
18 belief that this case could be resolved on the merits before the 2022 construction
19 season begins. The Court relied on this aspiration to limit what it would consider as
20 irreparable harm to carrying out the Historic Properties Treatment Plan in denying the
21 Tribes' motion for preliminary injunction. ECF No. 92, pg 20. It relied on this aspiration
22 to deny RSIC's motion for leave to amend its complaint. ECF No. 167, pg. 5. And, it

¹ See *William Falk and Max Wilbert*, IBLA Case No. 2022-0016.

1 ordered BLM to produce materials previously withheld as deliberative and to
2 supplement the AR with a privilege log within 30-days because “the Court hopes to
3 resolve this case on the merits before the 2022 construction season begins...” ECF No.
4 155, pg. 6.

5 Now, the Court and the parties have learned that the AR was not close to
6 completion until February 11, 2022 and that throughout the period it was
7 incomplete, BLM insisted that the AR was complete when BLM either overlooked 8,000
8 documents or unreasonably failed to disclose their existence, either by including them
9 as non-deliberative documents with the originally produced ARs or listing them in a
10 privilege log.

11 BLM violated Fed. R. Civ. P. 37(b)(2) by disobeying the Court’s order to produce
12 the AR by July 30, 2021 and October 1, 2021. Now that BLM has shown its disdain for
13 discovery and scheduling orders, it is reasonable to mistrust that the AR produced on
14 February 11, 2022 is complete. BLM might, after another round of motion practice,
15 locate another 8,000 documents it hadn’t previously reviewed for inclusion in the AR, for
16 example.

17 It is also evident that BLM wanted many of the documents included in the
18 February 11, 2022 production to remain hidden. If BLM had been forthright, the Court
19 likely would have made a different decision on the Tribal Plaintiffs’ preliminary injunction
20 motion, would have ruled differently on RSIC’s motion to amend the complaint, would
21 have given BLM more time to produce the documents that doubled the AR, and would
22 have given the parties more time to review those documents so that schedule motions
23 would have been unnecessary.

V. Sanctions are necessary to compensate RSIC and to deter BLM from abusing the litigation process in the future.

Federal courts have imposed sanctions in cases similar to this one. In *Diaz-Fonseca v. Puerto Rico*, 451 F.3d 13, 26 (1st Cir. 2006), while imposing sanctions, the First Circuit stated: “What matters is that the district court twice ordered [Puerto Rico and its officials] to produce the record by a certain date and that they failed both times to come into full compliance with the court’s order.” The First Circuit also noted, like BLM did in this case, that: “All of the defendants violated discovery orders either by missing clearly established deadlines or by representing to the court that they had complied fully with their obligations, even when their submissions (timely or otherwise) were incomplete, vague, or evasive.” *Id.*

In *Oak Grove Technologies, LLC v. United States*, No. 21-775C, pgs. 1-2 (Fed. Cl. Nov. 3, 2021), the agency omitted just 2 documents from the originally-filed AR. The court ordered the government to show cause why monetary sanctions should not be imposed against the defendant agency for its piecemeal and improper handlings of the administrative record. *Id.* at pg. 2. The court in *Oak Grove Technologies* ultimately ordered the United States to pay the legal costs and expenses the plaintiff incurred in dealing with the AR issues because the agency’s failure to include omitted documents was “an improper compilation, submission, and certification of the administrative record.” *Id.* at pg. 28. And, the “omissions delayed resolving this case, wasted the Court’s judicial resources by forcing the Court to engage in fact finding on an incomplete record, and imposed substantial costs” on the plaintiff. *Id.* BLM has done the same things, here.

1 In *New York v. Dep't of Commerce*, No. 18-CV-2921, 2020 WL 2564933 at *87
 2 (S.D.N.Y. May 21, 2020), the court levied sanctions against the defendant federal
 3 agency after the agency “notified Plaintiffs and the Court that they had discovered a
 4 batch of documents that, in fact, should have been but were not produced to the
 5 Plaintiffs in the course of discovery.” This batch of documents totaled 900 previously
 6 unproduced documents. *Id.* And, the court noted that these 900 documents equaled
 7 “more than ten percent of the documents that Defendants were required to produce...”
 8 *Id.* at 95. Here, BLM notified the plaintiffs that it found around 8,000 documents after
 9 claiming the AR was complete multiple times to oppose all of the plaintiffs’ motions to
 10 supplement and to oppose RSIC’s motion to amend. And, these new documents equal
 11 more than 50% of the NHPA AR and around 45% of the EIS AR.

12 BLM disobeyed discovery orders and made false statements about the AR.
 13 These actions have had significant impacts on this case’s schedule and on the Court’s
 14 ability to review the whole AR and issue a ruling on the merits. These actions have also
 15 severely prejudiced the Tribal Plaintiffs’ attempts to obtain a preliminary injunction and
 16 RSIC’s attempt to amend its complaint.

17 **VI. A default judgment against BLM is appropriate to deter future AR**
 18 **production abuses.**
 19

20 Therefore, pursuant to Fed. R. Civ. P. 37(b)(2)(A)(vi), RSIC request that the
 21 Court render a default judgment vacating the Thacker Pass Lithium Mine Project’s
 22 Record of Decision (ROD). Default is appropriate because BLM withheld and
 23 misrepresented the true nature of documents that show BLM failed to comply with the
 24 National Historic Preservation Act (NHPA) and National Environmental Policy Act
 25 (NEPA) in issuing the Thacker Pass ROD.

1 The Ninth Circuit has identified five factors that a district court must consider
2 before dismissing a case or declaring a default:

3 (1) the public's interest in expeditious resolution of litigation; (2) the court's need
4 to manage its docket; (3) the risk of prejudice to the other party; (4) the public policy
5 favoring the disposition of cases on their merits; and (5) the availability of less
6 drastic sanctions.

7
8 *Adriana Intern. Corp. v. Thoerenm* 913 F.2d 1406, 1412 (9th Cir. 1990)

9 "We may affirm a dismissal where at least four factors support dismissal, or
10 where at least three factors strongly support dismissal." *Yourish v. Cal. Amplifier*, 191
11 F.3d 983, 990 (9th. Cir. 1999). Here, BLM violated court orders to produce the AR.
12 "Where a court order is violated, the first two factors support sanctions and the fourth
13 factor cuts against a default. Therefore, it is the third and fifth factors that are decisive."
14 *Adriana Intern. Corp* at 1412. BLM's violations of court orders were failures to produce
15 documents and "[f]ailure to produce documents as ordered, however, is considered
16 sufficient prejudice." *Id.*

17 Less drastic sanctions are insufficient to achieve the punitive and deterrent effect
18 Rule 37(b) sanctions are meant for. If federal agencies are allowed to play the kinds of
19 games with the AR that BLM has played in this case, these agencies will always hide
20 administrative records for as long as possible so that – as seen in this case – plaintiffs
21 will not be have access to evidence that counters or undermines the agency's position
22 in preliminary injunction motions, motions to amend complaints, and/or on appeal.

23 The reality is, plaintiffs rarely know what is in the AR while federal agencies (and
24 corporate defendants like Lithium Nevada who work side-by-side with federal agencies)
25 always do. The public must take agencies at their word about what is in the AR. And, if
26 plaintiffs don't even know the documentation exists, then it is very easy for BLM to lie or

1 simply remain silent about what's actually in the AR. This is such a powerful advantage
2 – and can be so easily abused – that agencies must be sternly punished when they do
3 abuse this advantage like BLM did here. If agencies are not forced to obey orders to
4 produce the AR, then they can always hold on to documentation until right before
5 summary judgment when they conveniently “just discovered” half the AR or “just
6 realized” 40,000 pages of documents weren’t deliberative after all.

7 Alternatively, if the Court decides less drastic sanctions are appropriate, RSIC
8 requests that the Court impose the following as relief for the timing delays and
9 unforeseen expenditures of resources occasioned by BLM’s deleterious delays:

- 10 • That the Court enter a ruling by which it deems the claimed failures by BLM to
11 consult with any Tribe prior to issuing the ROD to be factually established and
12 which also excuses all tribal plaintiffs from the necessity of proofs of those
13 matters, pursuant to Fed.R.Civ.P. 37(b)(2)(A)(i);
- 14 • That the Court strike the opposition to Plaintiff Reno-Sparks Indian Colony’s
15 Motion to Amend Complaint and grant the Motion *in toto*; and
- 16 • That the Court award monetary sanctions to Reno-Sparks Indian Colony to
17 compensate RSIC’s counsel for the research, preparation and prosecution of
18 motion practice aimed at proving BLM’s serial failures to undertake tribal
19 consultations required by the NHPA, which motions would have been
20 unnecessary had BLM been candid and forthcoming with the complete AR.

21
22 Respectfully submitted,

23
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CERTIFICATE OF SERVICE

I hereby certify that on Monday, April 4, 2022, I filed the foregoing using the United States District Court CM/ECF, which caused all counsel of record to be served electronically.

/s/Will Falk
Utah Bar No. 16678

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